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IN THE
Supreme Court Of The United States
OCTOBER TERM, 1997

CEASAR WRIGHT,
Petitioner,

v.

UNIVERSAL MARITIME SERVICE CORP., *et. al.*
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF *AMICUS CURIAE* OF NATIONAL ASSOCIATION OF MANUFACTURERS IN SUPPORT OF RESPONDENTS

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BRIEF *AMICUS CURIAE* OF NATIONAL ASSOCIATION OF MANUFACTURERS IN SUPPORT OF RESPONDENTS

The National Association of Manufacturers respectfully submits this brief as *amicus curiae* in support of respondents.[1]

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[1] The parties have consented to the filing of this brief. Copies of the letters of consent have been filed with the Clerk of the Court. This brief was not authored in whole or in part by counsel for a party, and no person or entity, other than the *amicus curiae*, its members, and its counsel, made a monetary contribution to the preparation and submission of this brief.

INTEREST OF *AMICUS CURIAE*

The National Association of Manufacturers ("NAM") is the oldest and largest broad-based industrial trade association in the United States. Its nearly 14,000 member companies and subsidiaries, including 10,000 small manufacturers, employ approximately eighty-five percent of all manufacturing workers and produce over eighty percent of the nation's manufactured goods. More than 158,000 businesses are affiliated with the NAM through its Associations Council and National Industrial Council.

The NAM and these councils are vitally interested in the reasonable and fair enforcement of workplace laws, so as: (1) not to impair the ability of manufacturers to compete in the world market; (2) to ensure equal footing with other types of employers; and (3) to secure the benefits of such laws for employees of the NAM's members. To this end, the NAM has filed amicus briefs in various cases involving workplace issues, including *Brown v. Pro Football, Inc.*, 518 U.S. 231 (1996), *Livadas v. Aubry*, 510 U.S. 1083 (1994), *Willmar Electric Service, Inc. v. NLRB*, 507 U.S. 909 (1993), and *National Posters, Inc. v. NLRB*, 494 U.S. 1026 (1990).

American employers have a vital interest in the legal question presented by this case – the legal standards governing the enforceability of arbitration provisions in collective bargaining agreements. The outcome of this case accordingly will have a substantial impact on the NAM's members.

INTRODUCTION AND SUMMARY OF ARGUMENT

This Court repeatedly has recognized the strong federal policy favoring enforcement of arbitration provisions. In its modern decisions, the Court has established that arbitration is something to be embraced rather than resisted; that it is an alternative forum to court, not a derogation of rights; and

that it is a significant solution to problems of delay and overcrowding in our nation's courts. Consistent with well-settled principles, the Court once again should hold that the disputed arbitration provisions should be enforced. There is no valid basis for a special rule exempting the arbitration provisions at issue from the general principles governing arbitration provisions.

Certain cardinal points are, by now, indisputable. It is clear that, contrary to the judicial hostility that existed at common law, arbitration provisions now are generally enforceable. *See, e.g., Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1 (1983). It is clear that, outside the collective bargaining context, arbitration provisions that concern statutory rights likewise are generally enforceable. *See, e.g., Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477 (1989). It is clear that arbitrable statutory claims include claims asserted under federal employment and discrimination statutes. *See, e.g., Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991). And it is clear that arbitration provisions in collective bargaining agreements should be rigorously enforced, at least with regard to non-statutory claims. *See, e.g., United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960).

The question in this case is whether there should be a special exception from these principles for one category of arbitration clauses – those found in collective bargaining agreements, and which mandate arbitration of claims grounded in federal statutes. Petitioner's principal justifications – the asserted incapacity of arbitrators and arbitration to address the kinds of claims at issue; the special context of collective bargaining; and this Court's decision in *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974) – fall far short of establishing an exception to the general rule of arbitrability of disputes. Indeed, the particular issue before

the Court – whether an arbitration provision should be given effect to require submission by a union member of his workplace dispute to an agreed arbitral forum – was not even presented in *Gardner-Denver*, a case in which the question before the Court was the effect to be given an arbitration decision.

Just as the Court in the past has repeatedly enforced arbitration provisions in a wide variety of contexts, so too the Court should enforce arbitration provisions in this context.

ARGUMENT

I. ARBITRATION IS A WELL-ESTABLISHED, VITAL ASPECT OF A BROAD RANGE OF LEGAL RELATIONSHIPS

A. This Court Has Emphasized The Broad Federal Policy Favoring Arbitration

As this Court repeatedly has emphasized, dispute resolution through arbitration is a recognized and established component of many relationships, and serves important public policies and goals.

1. This Court Repeatedly Has Embraced Arbitration

This Court has made clear that enforcement of arbitration provisions should be encouraged. In doing so, it has repeatedly had to overcome an outmoded judicial presumption against arbitration, and, indeed, a judicial hostility to arbitration. More than seventy years ago, Congress enacted the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1 *et seq.*, "to overcome an anachronistic judicial

hostility to agreements to arbitrate, which American courts had borrowed from English common law." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 625 n.14 (1985). The Court has emphasized that "we are well past the time when judicial suspicion of the desirability of arbitration and of the competence of arbitral tribunals inhibited the development of arbitration as an alternative means of dispute resolution." *Id.* at 626-27.[2]

Even since enactment of the FAA, however, this Court has been forced repeatedly to overcome a judicial inclination against arbitration. In *Wilko v. Swan*, 346 U.S. 427 (1953), for example, the Court initially declined to enforce an arbitration agreement regarding the Securities Act of 1933; more recently, the Court emphasized that *Wilko* itself rested on an unjustified skepticism of arbitration. "[T]he mistrust of arbitration that formed the basis for the *Wilko* opinion . . . is difficult to square with the assessment of arbitration that has prevailed since that time." *Shearson/American Express Inc. v. McMahon*, 482 U.S. 220, 233 (1987). Indeed, the Court ultimately overruled *Wilko*'s holding regarding the non-enforcement of arbitration provisions concerning the Securities Act, and found explicitly that "[t]he Court's characterization of the arbitration process in *Wilko* is pervaded by what Judge Jerome Frank called the 'old judicial hostility to arbitration.'" *Rodriguez de Quijas*, 490 U.S. at 480. The Court emphasized that *Wilko*'s "suspicion of arbitration as a method of weakening the protections afforded in the substantive law" is "far out of step with our current strong endorsement of the federal statutes favoring this method of resolving disputes." *Id.* at 481. The Court

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[2] *See also, e.g., Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 219-21 & n.6 (1985); *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 510 & n.4 (1974) (Act was intended to "revers[e] centuries of judicial hostility to arbitration agreements").

particularly castigated "the outmoded presumption of disfavoring arbitration proceedings." *Id.*

Two federal statutes repeatedly have informed the Court's acceptance of arbitration in the past, and again should do so here. The FAA establishes a broad "federal policy favoring arbitration agreements." *Moses H. Cone Mem'l Hosp.*, 460 U.S. at 24. [3] The Labor Management Relations Act ("LMRA") likewise reflects a strong policy favoring arbitration agreements. The Court has found it "clear . . . that Congress [in the LMRA] adopted a policy which placed sanctions behind agreements to arbitrate grievance disputes, by implication rejecting the common-law rule . . . against enforcement of executory agreements to arbitrate." *Textile Workers Union of Am. v. Lincoln Mills of Ala.*, 353 U.S. 448, 456 (1957). Arbitration "is the substitute for industrial strife," and "arbitration of labor disputes under collective bargaining agreements is part and parcel of the collective bargaining process itself." *Warrior & Gulf Navigation Co.*, 363 U.S. at 578.

Together, the FAA and the LMRA establish cognate policies strongly supporting arbitration. Indeed, this Court has applied decisions under both statutes in explaining the broad federal policy favoring arbitration. *See, e.g., Mitsubishi Motors*, 473 U.S. at 626 (invoking, in an FAA context, the *Steelworkers* LMRA decisions in explaining the "federal substantive law of arbitrability" and corresponding "body of law"); *United Paperworkers Int'l Union, AFL-CIO v. Misco, Inc.*, 484 U.S. 29, 40 n.9 (1987) ("the federal courts have often looked to the [FAA] for guidance in labor

[3] Numerous courts have held that the FAA applies both to employment contracts and to collective bargaining agreements. *See, e.g., McWilliams v. Logicon, Inc.*, No. 97-3190, 1998 U.S. App. LEXIS 8445, at *6 (10th Cir. May 1, 1998) (citing cases). Some courts, however, have reached a contrary conclusion. *Id.*

arbitration cases"). Taken together, Congress's endorsement of arbitration in these statutes and this Court's decisions construing the FAA and the LMRA reflect the broad federal policy favoring enforcement of arbitration provisions.

2. The Broad Federal Policy Favoring Arbitration Includes Resolution Of Claims Founded On Statutory Rights

The broad federal policy favoring arbitration extends to resolution of claims founded on statutory rights. Thus, in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985), the Court found that an arbitration provision should be enforced regarding Sherman Act claims; in *Shearson/American Express Inc. v. McMahon*, 482 U.S. 220 (1987), the Court found that an arbitration provision should be enforced regarding the Securities and Exchange Act of 1934 and the Racketeer Influenced and Corrupt Organizations Act ("RICO"); and, in *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477 (1989), the Court found that an arbitration provision should be enforced regarding the Securities Act of 1933. The Court has emphasized that the "duty to enforce arbitration agreements *is not diminished* when a party bound by an agreement raises a claim founded on statutory rights." *McMahon*, 482 U.S. at 226 (emphasis added). Indeed, the Court has stated that "[t]here is no reason to depart from these guidelines where a party bound by an arbitration agreement raises claims founded on statutory rights." *Mitsubishi Motors Corp.*, 473 U.S. at 626.

The Court similarly has applied the presumption in favor of arbitration provisions in the context of claims regarding employment and discrimination statutes. In *Gilmer*, the Court held that the same framework which applies to arbitration provisions concerning other statutory claims also applies to arbitration provisions concerning employment and

discrimination statutes, including claims under the Age Discrimination in Employment Act ("ADEA"). The Court explained that "[i]t is by now clear that statutory claims may be the subject of an arbitration agreement." *Id.* 500 U.S. at 26. The Court specifically rejected the argument that "compulsory arbitration of [such] claims pursuant to arbitration agreements would be inconsistent with the statutory framework and purposes of the ADEA." *Id.* at 27.

3. The Broad Federal Policy In Favor Of Arbitration Includes Arbitration In The Collective Bargaining Context

This Court also has recognized the general policy in favor of arbitration in the context of collective bargaining agreements and the LMRA. The Court has emphasized, in this context, the "congressional policy in favor of settlement of disputes by the parties through the machinery of arbitration." *United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. at 582. For this reason, the Court has stressed a strong presumption in favor of finding disputes to be arbitrable under a collective bargaining agreement: "[a]n order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. *Doubts should be resolved in favor of coverage.*" *Id.* at 582-83 (emphasis added). Thus, just as the Court has recognized a broad policy favoring enforcement of arbitration provisions outside the collective bargaining context, so too the Court has recognized a broad policy favoring enforcement of arbitration provisions within the collective bargaining context.

Accordingly, it is indisputable that: (1) this Court repeatedly has overcome judicial hostility to arbitration; (2) the broad federal policy favoring arbitration encompasses

statutory claims, including claims based on employment and discrimination statutes; and (3) the broad federal policy favoring arbitration includes arbitration in the collective bargaining context.

B. Arbitration Provisions Play A Critical Role In Labor Relations

Particularly in light of the clear federal policy favoring enforcement of arbitration provisions, it is important to emphasize that enforcement of arbitration provisions is an essential element of labor relations.

Arbitration now plays an essential role in resolving disputes.[4] Arbitration provisions are common in the workplace, both in the collective bargaining arena and in non-collective bargaining contexts.[5] Arbitration provisions serve many salutary purposes in the workplace. They provide a swift, inexpensive method of dispute resolution and avoid divisive industrial strife. *See Gilmer,* 500 U.S. at 28; *Warrior & Gulf,* 363 U.S. at 582-83; *United Steelworkers of Am. v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 596 (1960).

It should be emphasized that arbitration is a neutral process, which does not favor one party or the other. *See generally* Frank Elkouri & Edna Asper Elkouri, *How Arbitration Works* (5th ed. 1997). For example, arbitration does not favor employers: arbitrators are perfectly capable

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[4] In 1997 alone, over 78,000 arbitrations were conducted under the auspices of the American Arbitration Association. *See* American Arbitration Association, *The American Arbitration Association Implements the Smart Solution, A New Three Step Dispute Resolution Program to Resolve Disputes With Its Employees* (visited June 25, 1998) <http://www.adr.org/press/smart_ solution.html>.

[5] For example, 96% of collective bargaining agreements contain arbitration clauses covering discrimination claims. *See* The Bureau of National Affairs, *Basic Patterns in Union Contracts* 131-32 (13th ed. 1992).

of ruling against employers.[6] Nor does it favor high-income workers over low-income workers. Because arbitration facilitates greater access to dispute resolution, some have emphasized that arbitration may be particularly helpful to lower-income workers.[7]

Employers, employees, unions, and others routinely participate in a broad range of arbitration proceedings. As this Court's repeated pronouncements embracing arbitration indicate, stereotypes of arbitrators and arbitration are unfounded. As this Court has emphasized, there is no basis for a wholesale condemnation of the process. Sweeping denunciation of the adequacy of arbitration and arbitrators reflects the distrust of the arbitral process that this Court has had to overcome in implementing the broad federal policy favoring enforcement of arbitration provisions.

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[6] *See generally, e.g.*, Mark Berger, *Can Employment Law Arbitration Work?*, 61 U. Mo. L. Rev. 693, 714 (1993) (explaining that "the experience in the labor arbitration arena suggests that the arbitration process is more than able to produce plaintiff victories where the claims are justified").

[7] A bipartisan, blue-ribbon governmental commission appointed by the Secretary of Labor and Secretary of Commerce recently concluded:

> [C]ourt litigation has become a less-than-ideal method of resolving employees' public law claims. . . . [E]mployees bringing public law claims in court must endure long waiting periods as governing agencies and the overburdened court system struggle to find time to properly investigate and hear the complaint. Moreover, the average profile of employee litigants . . . indicates that lower-wage workers may not fare as well as higher-wage professionals in the litigation system; lower-wage workers are less able to afford the time required to pursue a court complaint, and are less likely to receive large monetary relief from juries.

Department of Labor and Department of Commerce, Commission on the Future of Worker-Management Relations, *Report and Recommendations* 30 (Dec. 1994).

II. ARBITRATION PROVISIONS IN COLLECTIVE BARGAINING AGREEMENTS SHOULD BE ENFORCED

Particularly in light of the broad federal policy favoring arbitration, arbitration provisions in collective bargaining agreements should be given effect, including provisions that reach claims based on statutory rights. As explained, under this Court's precedents it is clear that: (1) an arbitration provision concerning statutory claims outside the collective bargaining context must be given effect; and (2) an arbitration provision concerning non-statutory claims within the collective bargaining context must be given effect. An arbitration provision concerning statutory claims within the collective bargaining context likewise should be given effect.

This Court has emphasized that a party objecting to the applicability of an arbitration agreement has the burden of establishing the inapplicability of the arbitration provision. "The burden is on the party opposing arbitration . . . to show that Congress intended to preclude" the arbitral forum. *McMahon*, 482 U.S. at 227; *see also Gilmer*, 500 U.S. at 26. That burden here rests squarely upon the petitioner. In attempting to meet this burden, petitioner raises three principal arguments in contending that arbitration should be unavailable for statutory claims in the collective bargaining arena: (1) arbitrators and the arbitration process are unsuited for resolution of such issues; (2) the nature of collective bargaining renders arbitration of such issues inappropriate; and (3) this Court's decision in *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974) purportedly precludes arbitration of statutory claims in the collective bargaining context. None of these contentions is meritorious. None is sufficient, moreover, to preclude operation of two cardinal principles established by this Court – that the mandatory arbitration of statutory claims, including employment and

discrimination claims, is permissible; and that the mandatory arbitration of claims in the collective bargaining context is permissible.[8]

In considering these points, it also is important to emphasize precisely what is at issue in this case – whether a party whose collective bargaining agent bargained for (and obtained) a contract clause compelling arbitration may be held to that agreement. Although petitioner raises a wide range of additional issues (such as the effect to be given such an arbitration in a subsequent judicial proceeding), the only issue before the Court is the threshold, crucially important, straightforward question – whether a binding arbitration provision in a collective bargaining agreement should be enforced regarding statutory claims, as it unquestionably would be *outside* the collective bargaining context, and as it unquestionably would be *within* the collective bargaining context for non-statutory claims. Just as this Court repeatedly has rejected efforts to hobble enforcement of arbitration provisions in other contexts, so too the Court should reject such an effort here, and should reiterate, once again, the broad federal policy favoring arbitration.

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[8] With regard to petitioner's claims concerning the statutory text and legislative history of the Americans With Disabilities Act ("ADA"), *amicus* agrees with respondents that the ADA permits mandatory arbitration. *See* Pub. L. No. 101-336, 104 Stat. 327 (codified at 42 U.S.C. § 12212 (1990)); *see also McWilliams v. Logicon, Inc.*, 1998 U.S. App. LEXIS 8445; *Bercovitch v. Baldwin School, Inc.*, 133 F.3d 141 (1st Cir. 1998); *Miller v. Public Storage Management, Inc.*, 121 F.3d 215 (5th Cir. 1997).

A. The Capacity Of Arbitrators And The Arbitration Process Is Not A Valid Reason To Deny Enforcement Of An Arbitration Provision

Petitioner suggests that arbitrators and the arbitration process render enforcement of an arbitration provision inapplicable in the collective bargaining process. The short answer to this objection is that it is precisely the kind of objection that repeatedly has been urged in favor of judicial hostility to arbitration provisions – and precisely the kind of objection that this Court repeatedly has rejected. The reasons for rejecting the objection in other contexts are fully applicable here.

For example, in *Mitsubishi Motors v. Soler Chrysler-Plymouth*, the Court overrode objections to arbitrating a complex claim under the federal antitrust statutes. The Court emphasized that "potential complexity should not suffice to ward off arbitration." 473 U.S. at 633. The Court further stressed that "adaptability and access to expertise are hallmarks of arbitration." *Id.* In *Shearson/American Express Inc. v. McMahon*, the Court likewise emphasized that "a general suspicion of the desirability of arbitration and the competence of arbitral tribunals" applies "with no greater force to the arbitration of securities disputes than to the arbitration of legal disputes generally." 482 U.S. at 231. The Court reiterated the *Mitsubishi* holding that "arbitral tribunals are readily capable of handling the factual and legal complexities of antitrust claims, notwithstanding the absence of judicial instruction and supervision," and that "the streamlined procedures of arbitration do not entail any consequential restriction on substantive rights." *Id.* at 232. The Court explicitly rejected the challenge to "the competence of arbitral tribunals." *Id.* In *Gilmer*, moreover, the Court squarely rejected "a host of challenges to the adequacy of arbitration procedures." 500 U.S. at 30. The

Court emphasized that the challenges reflect "generalized attacks on arbitration" of a type that the Court repeatedly has rejected. *Id.*[9]

Accordingly, the objection that the resolution of the claims at issue is inappropriate for arbitration and arbitrators is inadequate to preclude arbitration. This Court has rejected such arguments repeatedly, and should do so here as well.

B. The Nature Of The Collective Bargaining Process Provides A Strong Basis For Enforcement Of Arbitration Provisions

Petitioner contends that the nature of the collective bargaining process itself provides a basis for refusing to enforce an arbitration provision in a collective bargaining agreement. In fact, just the opposite is true. It is indisputable that a collective bargaining agreement appropriately may include provisions for the arbitration of non-statutory claims. Nothing about the collective bargaining context supports a categorical rule precluding arbitration of statutory claims. Here, as elsewhere, the party asserting preclusion has the burden of establishing preclusion, and may do so only by establishing a congressional intent in the pertinent statute. *See Gilmer*, 500 U.S. at 26. Petitioner cannot meet this burden.

This Court repeatedly has emphasized the propriety and enforcement of arbitration provisions in collective bargaining agreements. *See, e.g., Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 219 (1985) (emphasizing "the central role of arbitration in the collective bargaining context"); *Warrior & Gulf Navigation Co.*, 363 U.S. at 578

[9] Indeed, the expertise and experience of arbitrators is one of the noted benefits of the arbitral process. *See generally* Frank Elkouri & Edna Asper Elkouri, *How Arbitration Works* 198-201 (5th ed. 1997).

("arbitration of labor disputes under collective bargaining agreements is part and parcel of the collective bargaining process itself"); *id.* at 581 ("[a]part from matters that the parties specifically exclude, all of the questions on which the parties disagree must . . . come within the scope of the grievance and arbitration provisions of the collective agreement"); *Boys Markets, Inc. v. Retail Clerks Union, Local 770*, 398 U.S. 235, 252 (1970) (noting "the importance that Congress has attached" to arbitration, and the "central" role of arbitration in "the administration of collective bargaining agreements") (internal citations omitted). Petitioner contends, nevertheless, that the central and positive role arbitration plays in the collective bargaining context is inapplicable when statutory claims are at issue. As with other objections that have been raised to arbitration provisions in various contexts, however, this objection is untenable.

Most fundamentally, the objection is based on a misconception. An arbitration provision involves a designation of forum, not a surrender of a claim. As this Court has emphasized, "[b]y agreeing to arbitrate a statutory claim, a party does not forego the substantive rights afforded by the statute." *Gilmer*, 500 U.S. at 26 (*citing Mitsubishi Motors Corp.*, 473 U.S. at 628). Again and again, the Court has rejected this argument: "the streamlined procedures of arbitration do not entail any consequential restriction on substantive rights." *McMahon*, 482 U.S. at 232.

Indeed, it is well-established that unions may make binding agreements with regard to a broad range of important legal rights. For example, it has been held that a public employees' union permissibly may agree, as the agent for its members, that the members will submit to drug tests, notwithstanding possible Fourth Amendment objections. *See, e.g., Bolden v. Southeastern Penn. Transp. Auth.*, 953 F.2d 807, 827 (3d Cir. 1991), *cert. denied*, 504 U.S. 543

(1992). Moreover, this Court has held that the legislative assessment of the value of the "union shop" – in which the union may act for employees as a whole, even if individual employees object – is so important that it justifies any resulting impingement on the constitutional right to freedom of association. *See Chicago Teachers Union v. Hudson*, 475 U.S. 292, 302-03 (1986); *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 222 (1977).

Petitioner's objection would cause a bizarre bifurcation in the procedures available for enforcing employees' statutory rights, depending on whether the employee were subject to a collective bargaining agreement. Consider two employees with identical age discrimination claims. Under petitioner's approach, a non-union employee subject to a binding arbitration provision would be bound to arbitrate (per *Gilmer*), while a union employee subject to a binding arbitration provision would not. In other contexts, this Court has emphasized that interpretations of principles governing arbitration provisions should not lead to such anomalous and inconsistent results. *See, e.g., Rodriguez de Quijas*, 490 U.S. at 485 (inconsistent result with regard to the enforceability of an arbitration provision "makes little sense for similar claims, based on similar facts"). No such inconsistency should be created here. Indeed, it would be especially inappropriate to permit such inconsistency where the existence of a collective bargaining agreement would render an arbitration provision *less* enforceable – in light of the established, central role for arbitration provisions in collective bargaining agreements. It is especially difficult to imagine that Congress and this Court would intend that, as between the two hypothetical workers described above, the contract formed as a result of collective bargaining would be avoidable by the worker, while the contract formed by the individual employee would not.

This Court also has emphasized the broad federal policy favoring arbitration in the collective bargaining context itself, and distinguished precedent evoking judicial hostility to arbitration (which the Court subsequently overruled). *See Warrior & Gulf Navigation Co.*, 363 U.S. at 578 (distinguishing *Wilko*, which was later overruled by *Rodriguez*, and finding that *Wilko*'s skepticism of arbitration should not preclude broad federal policy favoring arbitration in collective bargaining context). It is precisely in the collective bargaining context where Congress and the Court have repeatedly emphasized that the worker has the greatest bargaining strength. *See, e.g., Warrior & Gulf*, 363 U.S. at 582-83; *Enterprise Wheel & Car Co.*, 363 U.S. at 597. Accordingly, contracts forged in this milieu should be the most strictly enforced.

Equally without merit is petitioner's contention that the general rule of arbitrability is inapplicable because of the possibility that a union will decline to proceed with a grievance or a request for arbitration. This argument for a special rule is unavailing for several reasons.

First, based on the possibility that a union will not pursue arbitration, petitioner seeks to have the exception drive the rule, ignoring the important benefits arbitration provides, as recognized by settled federal policy and this Court's precedents. The argument ignores the fact that unions repeatedly handle such claims, and there is no evidence to support the view that unions do not pursue such claims vigorously.[10]

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[10] *See, e.g.*, Robert A. Gorman, *The* Gilmer *Decision and the Private Arbitration of Public Law Disputes*, 1995 U. Ill. L. Rev. 635, 675 n.128 (1995) (noting the lack of empirical support for a distinction between *Gilmer* and *Gardner-Denver* that turns on the idea that unions will not ardently represent their members). Not only does the evidence fail to support the contention that unions will be less than zealous, unions have a strong interest in negotiating favorable arbitration agreements and pursuing meritorious claims. *See Clayton*

(Continued...)

Second, even where a union does not go forward, an individual employee has recourse to the arbitration process or to judicial oversight. If a union declines to pursue a grievance and compel arbitration, the employee will have one of two options: depending on the collective bargaining agreement, either (1) the employee has the option of proceeding with the grievance or arbitration individually, *see* 29 U.S.C. § 159(a), in which case the employer can resolve the dispute with the employee without union participation; or (2) the union will have exclusive authority to pursue a grievance or demand arbitration, in which case the individual can proceed to court if the union's refusal to go forward is wrongful. *See Republic Steel Corp. v. Maddox,* 379 U.S. 650, 657-59 (1965); *DelCostello v. International Bhd. of Teamsters,* 462 U.S. 151, 163-65 (1983). Courts are uniquely capable of developing standards for wrongfulness in this context based on their federal common law authority under the LMRA. *See Lincoln Mills,* 353 U.S. at 456.

The Court need not reach those standards because they are not presented in this case. There has been no showing that the union refused petitioner's request to go forward with the grievance and arbitration process. Instead, there is only evidence that petitioner and his union discussed his case and that the union suggested that he file suit in court. Pet. App. 3a-4a. Both the petitioner and the union failed to pursue the grievance and arbitration process. To the extent that there is a suggestion of confusion about the governing law because the Fourth Circuit's *Austin* decision had not yet issued (Pet. Br. at 3-4), this suggested confusion – and resulting

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(...Continued)

v. *International Union United Auto., Aerospace and Agric. Implement Workers of Am.*, 451 U.S. 679, 686 n.11 (1981) (noting that the conscientious handling of grievances enhances the union's prestige with employees and strengthens its stature as the exclusive bargaining representative).

idiosyncratic facts – cannot justify a sweeping rule holding all such arbitration provisions unenforceable. Assuming arguendo that petitioner was confused, this confusion was caused by an asserted clarification in the governing law, not by any unfairness in the arbitration process. It should not be allowed to distort the issue, and should not lead to an adoption of principles inconsistent with the strong federal policy favoring arbitration, as established in statute and this Court's precedents.

Accordingly, petitioner's contention that the nature of the collective bargaining relationship precludes enforcement of an arbitration provision regarding statutory claims is unavailing. Just as arbitration of non-statutory claims serves valuable purposes in the collective bargaining context, and just as arbitration of statutory claims serves valuable purposes outside the collective bargaining context, so too arbitration of statutory claims in the collective bargaining context serves valuable purposes. And, just as enforcement of arbitration provisions in other contexts is required by federal policy and this Court's holdings implementing that policy, so too is enforcement of arbitration provisions required in this context.

C. This Court's Decision In *Gardner-Denver* Does Not Preclude Arbitration

Finally, petitioner contends that this Court's decision in *Gardner-Denver* compels a different rule for arbitration of statutory claims in collective bargaining agreements than the rule that governs (1) arbitration of statutory claims outside the collective bargaining context and (2) arbitration of non-statutory claims in the collective bargaining context. Petitioner's request for a special rule is untenable.

The short, and sufficient, answer to petitioner's argument is that *Gardner-Denver* did not involve the question at issue

here. Instead, *Gardner-Denver* involved an individual who had pursued a contractual claim through the arbitration process; the question was the effect to be given to the arbitration decision, and whether it barred subsequent judicial review of a statutory claim. *See Gardner-Denver*, 415 U.S. at 43. Similarly, both *McDonald v. City of West Branch*, 466 U.S. 284 (1984) and *Barrentine v. Arkansas-Best Freight System, Inc.*, 450 U.S. 728 (1981) – upon which petitioner also seeks to rely – involve the effect to be given to arbitration decisions, not a failure to undergo arbitration entirely. As a result, "those cases did *not* involve the issue of the enforceability of an agreement to arbitrate statutory claims. Rather, they involved the quite different issue whether arbitration of contract-based claims precluded judicial resolution of statutory claims." *Gilmer*, 500 U.S. at 35 (emphasis added). Thus, any claim that the holding in *Gardner-Denver* precludes enforcement of the arbitration provision is erroneous. *See, e.g., United States v. Stanley*, 483 U.S. 669, 680 (1987) ("no holding can be broader than the facts before the court"); *Crawford-El v. Britton*, 118 S. Ct. 1584, 1592 (1998).

To the extent that *Gardner-Denver* includes more general dicta about the nature of arbitration and enforcement of statutory rights, these comments, now nearly a quarter century old, must be considered in their historical context and in light of the Court's more contemporary decisions. This Court repeatedly has rejected the outmoded skepticism of arbitration, and has emphasized the broad federal policy favoring arbitration. Indeed, in *Gilmer* itself, this Court specifically disavowed *Gardner-Denver*'s general skepticism of the arbitration process. *See Gilmer*, 500 U.S. at 34 n.5. Accordingly, petitioner's argument that the Fourth Circuit's judgment cannot be affirmed consistent with *Gardner-Denver*'s holding is unavailing.

Moreover, the Court should reject the request of petitioner's *amici* for the Court to create a code-like "rule book" addressing when disputes will or will not be arbitrable. The facts of this case illustrate, as well as any, the rich diversity of situations in which parties can bargain for various kinds of dispute resolution (here, a three-step grievance process ending in arbitration). What the Court can and should do is to enforce agreements to arbitrate workplace claims, whether the employees are covered by a collective bargaining agreement or not. The various ways that an individual's statutory claim might or might not be pursued in the collective bargaining context can be handled by existing law, to be interpreted and developed by the lower courts. Both the FAA and the LMRA provide standards by which courts can stay cases pending arbitration or dismiss cases without prejudice to allow arbitration to proceed.[11] In either instance, court intervention is possible in the event that the arbitration process fails.

The judgment below is consistent with the objective of providing parties – whether covered by a collective bargaining agreement or not – with an arbitration forum in which to resolve their disputes. The magistrate judge dismissed petitioner's complaint *without prejudice* and carefully avoided addressing the merits of his claim, stating simply that "[t]he arbitration agreement should be enforced [and that] [t]he question of whether arbitration may now be available or the result thereof is not before the court." Pet. App. 26a. The district court similarly granted summary judgment for the defense but dismissed *without prejudice*. Pet. App. 18. The district court would have entertained

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[11] *See* 9 U.S.C. § 3; *United Paperworkers Int'l Union, AFL-CIO v. Misco, Inc.*, 484 U.S. 29, 40 n.9 (1987) (noting that the federal courts look to the standards of the FAA in developing federal common law under § 301 of the LMRA).

evidence by petitioner that the union had "handled his grievance perfunctorily or in bad faith, [or] . . . that a union breach of duty contributed to an erroneous outcome in the contractual grievance proceedings." *Id.* Petitioner failed to present that evidence. Accordingly, the Fourth Circuit affirmed while noting that no arbitration had yet addressed the merits or arbitrability of petitioner's claims Pet. App. 5a. Thus the decision simply stands for enforcement of the arbitration provision and the arbitral regime; other issues were not presented or addressed for the fundamental reason that no arbitration had occurred.

In sum, contrary to petitioner's extensive protestations, *Gardner-Denver* does not support a categorical rule prohibiting the enforcement of arbitration provisions in the collective bargaining context with regard to statutory claims. Nor do the principles governing arbitration both within and outside the collective bargaining context – which establish a broad federal policy favoring arbitration and which include statutory claims outside the collective bargaining context – support such a rule. Indeed, to the extent that *Gardner-Denver* is given such a reading, it is "far out of step with [the Court's] current strong endorsement of the federal statutes favoring this method of resolving disputes." *Rodriguez de Quijas,* 490 U.S. at 480. *Gardner-Denver* cannot furnish the justification for petitioner's special rule of inarbitrability; as with other such provisions, arbitration provisions in collective bargaining agreements providing for arbitration of statutory claims should be given effect.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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